FILE COPY

Office - Supreme Court, U. S
FILED
MAY 12 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. [redacted] 55

MARY DUKE BIDDLE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND SUPPORTING BRIEF.

WILLIAM R. PERKINS,
FORREST HYDE,
WILLIAM R. SPOFFORD,
FREEMAN J. DANIELS,
30 Rockefeller Plaza,
New York, N. Y.,
Counsel for Petitioner.

INDEX

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
Summary Statement of the Matter Involved	1
Reasons for Allowance of the Writ	3
Prayer for Writ	4
BRIEF IN SUPPORT OF PETITION	5
Opinions Below	5
Jurisdiction	5
Question Presented	5
Statutes Involved	6
Statement	7
SPECIFICATION OF ERRORS TO BE URGED	7
ARGUMENT	8
Summary of Argument	8
Point A. A direct conflict on the issue involved here exists in the decisions of the United States Circuit Courts of Appeals for the First and Second Circuits	8
Point B. The Court below ignored the proven facts and reached a conclusion contrary thereto	10
Point C. The decision of the Court below sanctioned a departure from the settled practice and published rulings of Respondent of more than fifteen years' standing	13
CONCLUSION	14

TABLE OF CASES CITED

Badische Anilin & Soda Fabrik v. *A. Klipstein & Co.*, 125 Fed. 543 11

Columbian Carbon Company v. *Commissioner*, 25 B. T. A. 456 11

PAGE

Eitingon-Schild Company, et al. v. *Commissioner*, 21 B. T. A. 1163 ---- 11

Elkins v. *Commissioner*, 33 B. T. A. 127, pending, but undecided in the United States Circuit Court of Appeals for the Third Circuit ---- 9

Elmendorf v. *Taylor*, 10 Wheat. 152; 6 L. ed. 289 ---- 12

Ennis v. *Smith*, 14 How. 400, 14 L. ed. 472 ---- 10

Helvering v. *Bliss*, 293 U. S. 144; 79 L. ed. 246 ---- 13

Herbst v. *S. S. Asiatic Prince*, 108 Fed. 287 ---- 11

Keen v. *Commissioner*, 15 B. T. A. 1243 ---- 11

Liverpool and Great Western Steam Company (Limited) v. *The Phenix Insurance Company*, 129 U. S. 397; 32 L. ed. 788 ---- 10

Mallouk v. *Commissioner*, 34 B. T. A. 269 ---- 11

McFeely v. *Commissioner*, 296 U. S. 102; 80 L. ed. 83 13

United Dyewood Corporation v. *Bowers*, 56 Fed. (2d) 603 ---- 11

United Shoe Machinery Corporation v. *White, et al.*, Prentice Hall Federal Tax Service, Vol. I, ¶ 1300 (1937) ---- 3, 9, 12

United States v. *Midwest Oil Co.*, 236 U. S. 459; 59 L. ed. 673 ---- 14

STATUTES AND RULINGS CITED

I. T. 2401, VII-1 C. B. 126 ---- 13

Judicial Code, Sec. 240(a) ---- 5

Revenue Act of 1928 ---- 2, 5, 6, 7, 9

S. M. 3040, IV-1 C. B. 198 ---- 13

S. M. 5363, V-1 C. B. 89 ---- 13

United Kingdom Income Tax Act, 1918 ---- 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No.

MARY DUKE BIDDLE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully prays for a Writ of Certiorari to review an Order of the Circuit Court of Appeals for the Second Circuit entered in the above case on December 14, 1936 affirming an Order of the United States Board of Tax Appeals entered on November 30, 1935.

Summary Statement of the Matter Involved.

Petitioner is a citizen of and resides in the United States. During the year 1929 she owned shares of stock in certain British corporations. Those corporations de-

cleared and paid to her dividends on her shares, and deducted and withheld from each such dividend United Kingdom Income Tax at the standard rate appropriate to each dividend, pursuant to the United Kingdom Income Tax Act of 1918, as amended (R. 26-29, Appendix A, p. 199 of Exhibit No. 1 and p. 29 of Exhibit No. 10). The stocks, rates of dividend, dates of payment, and amounts deducted are set forth in detail in the Record, pp. 26-30. She reported in her income tax return the gross dividends declared by the British corporations as "Dividends from Foreign Corporations". She computed the credit on Federal Income Taxes for taxes paid to a foreign country, pursuant to the terms of Sec. 131 of the Revenue Act of 1928, c. 852, 45 Stat. 791. The balance of such foreign taxes not available as a credit were deducted from gross income, pursuant to Sec. 23 (c) of said Act. Respondent contended that Petitioner paid no United Kingdom Income Taxes by deduction or otherwise. He disallowed the credit and computed the deficiency on the basis of the net amount received as dividends from such foreign corporations.

Petitioner appealed to the United States Board of Tax Appeals, alleging error with respect to the several adjustments made by the Commissioner. In its opinion (R. 103-119) in this case and four other cases consolidated with it, the Board held that only the net amount of cash received by the Petitioner as dividends from foreign corporations should be included in her gross income, and that no credit or deduction should be allowed on account of United Kingdom Income Taxes deducted and withheld from such dividends. Pursuant to such opinion, the Board entered an Order of Deficiency of $27,722.94, from which Petitioner appealed to the United States Circuit Court

of Appeals for the Second Circuit, which Court affirmed the decision of the Board.

Reasons for Allowance of the Writ.

1. On the question here at issue there exists a clear conflict between the decision in the instant case and the later decision of the United States Circuit Court of Appeals for the First Circuit in *United Shoe Machinery Corporation* v. *White, et al.* (not yet reported, but to be found in Prentice-Hall Federal Tax Service, Vol. I, ¶ 1300).

2. The decision of the United States Circuit Court of Appeals for the Second Circuit in this case sanctioned a departure from the settled practice and published rulings of Respondent of more than fifteen years' standing, which rulings have never been modified, amended or revoked, and have received Congressional approval in the reenactment of the credit provisions in all Revenue Acts since 1918.

3. The Circuit Court of Appeals for the Second Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

4. Because of the large number of American investors in British corporations, this question is of general importance in administering the Income Tax laws. It is important to the Government and to taxpayers generally that the question presented in this case should be settled by this Court so that existing confusion may be removed. It is of particular importance to those American citizens who invested in British corporations in reliance upon the Executive Department's long standing interpretation and

practice under the credit provisions of all Revenue Acts since 1918.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the Seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled on its docket *Mary Duke Biddle, Petitioner,* vs. *Commissioner of Internal Revenue, Respondent,* and that said Order of the Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Court may seem meet and just; and your Petitioner will ever pray.

Dated: New York, N. Y.,
May 10, 1937.

MARY DUKE BIDDLE,
By WILLIAM R. PERKINS,
FORREST HYDE,
WILLIAM R. SPOFFORD,
FREEMAN J. DANIELS,
30 Rockefeller Plaza,
New York, N. Y.,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the United States Board of Tax Appeals is reported in 33 B. T. A. 127 (R. 103-119).

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 86 Fed. (2d) 718 (R. 580-583).

Jurisdiction.

The Order of the Circuit Court of Appeals for the Second Circuit now sought to be reviewed was entered on December 14, 1936.

On February 3, 1937 Mr. Justice STONE of this Court signed an Order extending the time for sixty days within which Petitioner might make application for this Writ.

The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Sec. 347).

Question Presented.

The sole question presented is whether under Sec. 131 of the Revenue Act of 1928 all or any portion of United Kingdom Income Taxes deducted and withheld from dividends paid by British corporations to Petitioner should be allowed as a credit against United States Income Taxes as income taxes paid or accrued to a foreign country, and the balance thereof, if any, not available as a credit, deducted from gross income under Sec. 23(c) of said Act.

Statutes Involved.

Petitioner claimed a credit against income taxes due the United States under the provisions of Section 131(a) and (b) of the Revenue Act of 1928, which follow:

"Sec. 131. TAXES OF FOREIGN COUNTRIES AND POSSESSIONS OF UNITED STATES.

(a) Allowance of Credit.—The tax imposed by this title shall be credited with:

(1) Citizen and Domestic Corporation.—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; and

* * * * * * * *

(b) Limit on Credit.—In no case shall the amount of credit taken under this section exceed the same proportion of the tax (computed on the basis of the taxpayer's net income without the deduction of any income, war-profits, or excess-profits tax any part of which may be allowed to him as a credit by this section), against which such credit is taken, which the taxpayer's net income (computed without the deduction of any such income, war-profits, or excess-profits tax) from sources without the United States bears to his entire net income (computed without such deduction) for the same taxable year."

Petitioner claimed as a deduction the balance of British income taxes not available as a credit, under Section 23(c)(2) of the Revenue Act of 1928, which follows:

"Sec. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * * * *

(c) TAXES GENERALLY.—Taxes paid or accrued within the taxable year, except—

* * * * * * * *

(2) so much of the income, war-profits, and excess-profits taxes imposed by the authority of any foreign country or possession of the United States as is allowed as a credit against the tax under section 131; and * * *".

Statement.

The principal facts have been summarized in the Petition, *supra*, pp. 1-3.

Specification of Errors to be Urged.

1. The Circuit Court of Appeals erred in holding that the interpretation and construction placed upon British Income Tax Statutes by the British Parliament, the British Courts, and the Department of Inland Revenue of Great Britain are not conclusive in determining that Petitioner has paid an income tax to a foreign country.

2. The Circuit Court of Appeals erred in not deciding that, upon the basis of the British law as found by the Board, the Petitioner was entitled to the credit claimed under Sec. 131 of the Revenue Act of 1928.

3. The Circuit Court of Appeals erred in disregarding and holding invalid Respondent's settled and uniform practice of over fifteen years' standing under which claims aggregating millions of dollars, and identical with Petitioner's claim for credit here, were allowed without question.

4. The Circuit Court of Appeals erred in disregarding and holding invalid Respondent's published rulings al-

lowing the credit here claimed under the credit provisions of the Revenue Acts of 1918 and 1921, which rulings have never been modified, amended or revoked and have received Congressional approval in the reenactment of the credit provisions in all subsequent Revenue Acts without change as to the issue here involved.

5. The Circuit Court of Appeals erred in affirming the Order of the Board of Tax Appeals, which was contrary to and unsupported by the evidence and the Board's own findings.

Argument.

POINT A. A DIRECT CONFLICT ON THE ISSUE INVOLVED HERE EXISTS IN THE DECISIONS OF THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE FIRST AND SECOND CIRCUITS.

POINT B. THE COURT BELOW IGNORED THE PROVEN FACTS AND REACHED A CONCLUSION CONTRARY THERETO.

POINT C. THE DECISION OF THE COURT BELOW SANCTIONED A DEPARTURE FROM THE SETTLED PRACTICE AND PUBLISHED RULINGS OF RESPONDENT OF MORE THAN FIFTEEN YEARS' STANDING.

POINT A.

A direct conflict on the issue involved here exists in the decisions of the United States Circuit Courts of Appeals for the First and Second Circuits.

There is a direct conflict between the decision below and that of the United States Circuit Court of Appeals

for the First Circuit in *United Shoe Machinery Corporation v. White, et al., supra.*

The Court below expressly held "that under British law the shareholder is regarded as a taxpayer in respect to the amounts deducted from the dividends for income taxes 'appropriate' thereto" and that "the shareholder is regarded as an income taxpayer". In reaching this conclusion the Court below expressly accepted the conclusion of the expert who testified to this effect before the Board of Tax Appeals. Despite this holding it arrived at the anomalous conclusion that "under our statutes and under our principles of taxation the shareholder is not a taxpayer entitled to credits and deductions".

In the *United Shoe Machinery Corporation* case the Circuit Court of Appeals for the First Circuit held that an American shareholder in a British corporation is a taxpayer within the meaning of that system, as well as our own, and allowed the credit. In considering the Second Circuit's decision in this case, the First Circuit said:

> "But in the *Biddle* case it was held, as has been said, that although the tax was a tax on the shareholders, it was not 'paid by' them within the meaning of our law. We are unable to agree."

Thus it will be seen there is a conflict on the sole question presented here.

We should add that there is pending, undecided, in the Circuit Court of Appeals for the Third Circuit, the case of *Elkins* v. *Commissioner,* which involves the very same point and is the case upon which we based our application for an extension of time for filing this Petition.

POINT B.

The Court below ignored the proven facts and reached a conclusion contrary thereto.

In applying the credit provisions of Sec. 131 of the Revenue Act of 1928, the question of whether Petitioner paid a foreign income tax is governed by the laws of England. Such laws do not prove theselves but must be proved as facts. In *Liverpool and Great Western Steam Company (Limited)* v. *The Phenix Insurance Company,* 129 U. S. 397, 445, 32 L. ed. 788, 793, this Court said:

> "The law of Great Britain since the Declaration of Independence is the law of a foreign country, and, like any other foreign law, is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved."

In proving the English law, Petitioner followed the rules laid down by this Court in *Ennis* v. *Smith,* 14 How. 400, 426, 14 L. ed. 472. The English law was proved by copies of the Acts of Parliament, the decisions of the British Courts and the testimony of a duly qualified expert. The Board of Tax Appeals found (R. 111, 112):

> "The petitioners' expert witness, Talbot, stated unequivocally that under the English income tax acts and in their administration a stockholder receiving a dividend from a corporation is regarded as having paid the amount of tax 'appropriate' to the dividend."

The Circuit Court of Appeals for the Second Circuit determined "that under British law the shareholder is regarded as a taxpayer in respect to the amounts deducted from the dividends for income taxes 'appropriate' thereto", and that "this proof was not contradicted". Having done this and expressly stated "we may accept the proof of

foreign law", it proceeded to go beyond the testimony and reached the contrary and independent conclusion that "the shareholder is not a taxpayer". In so doing, the Court below ignored its own decision in *United Dyewood Corporation* v. *Bowers,* 56 Fed. (2d) 603, in which it was held that the foreign law was controlling.

The decision of the Court below definitely recognizes that for all purposes of the English Income Tax Acts, the shareholder pays income tax when it is deducted from his dividend by the company, but arrives at the conclusion that "under our statutes and under our principles of taxation the shareholder is not a taxpayer entitled to credits and deductions".

Our statutes simply provide that where the factual situation of payment of a foreign tax is proved, credit shall be allowed. Such a fact can only be proved by reference to the foreign law. The Board of Tax Appeals in dealing with the credit provisions of our Revenue Acts has uniformly held that once the foreign law has been determined it is controlling. *Herbert Ide Keen* v. *Commissioner,* 15 B. T. A. 1243, 1246; *Eitingon-Schild Company, et al.,* v. *Commissioner,* 21 B. T. A. 1163; *Columbian Carbon Company* v. *Commissioner,* 25 B. T. A. 456; *Mallouk* v. *Commissioner,* 34 B. T. A. 269.

The rule is clear in the Federal Courts that where the foreign law is proved by documentary evidence and the positive, uncontradicted and unequivocal testimony of an expert it "must be taken as conclusive". *Badische Anilin & Soda Fabrik* v. *A. Klipstein & Co.,* 125 Fed. 543; *Herbst* v. *S. S. Asiatic Prince,* 108 Fed. 287. The Court below ignored this fundamental rule and attempted independently to construe and interpret the British income tax laws. Such disregard of the proof of the foreign law

falls within the condemnation of Chief Justice MARSHALL in *Elmendorf* v. *Taylor*, 10 Wheat. 152, 6 L. ed. 289.

In the *United Shoe Machinery Corporation* case the true nature of the tax involved here was clearly understood and recognized. In considering the basic principle of the English income tax system, *i. e.*, that of taxing income by deduction at the source, which practice has been in continuous use in England for more than one hundred years, the Court said:

> "While it is settled that the tax is on the corporation, it is also settled that the amount of tax, appropriate to each share and deducted from the dividends, is to be considered as additional income of the shareholder; it is included in his income for supertax (surtax) purposes; he is referred to in the Income Tax Act of 1918 (the applicable statute) as a 'person who has paid by deduction * * * United Kingdom income tax,' etc. (sec. 55(1)). If a person who has received dividends, makes a claim that his total income was below the taxable minimum, the tax appropriate to his dividends is added to what he in fact received for the purpose of determining his income; and more significant still, if his income is below the taxable minimum, the amount of tax which was deducted from his dividends is returned to him *by the government.* (*Ritson* v. *Phillips,* 131 Law Times Rep. 384.) If the dividend is paid without deduction for tax the appropriate amount is added to the shareholder's income for purposes of surtax or relief. * * * It thus appears that, while the tax is assessed against the corporation, it falls and is by law required to fall, on the shareholders. It was said by the English Court of Appeal, 'The appellant here pays income tax although the tax is deducted at the source.' WARRINGTON, *L. J., Brooke* v. *Commissioners* (1918), 1 K. B. 257, 269. See too *Hamilton* v. *Commissioner* (1931), K. B. 495."

POINT C.

The decision of the Court below sanctioned a departure from the settled practice and published rulings of Respondent of more than fifteen years' standing.

The Respondent and his predecessors uniformly allowed credits similar in all respects to those claimed by Petitioner from the effective date of the Revenue Act of 1918 until late in 1933. Furthermore, in his published rulings he has held that an American citizen from whose British dividends United Kingdom Income Tax has been deducted at the source has paid income tax to a foreign country and is entitled to credit therefor, S. M. 3040, IV-1 C. B. 198, and S. M. 5363, V-1 C. B. 89. These rulings were expressly approved again in 1928 in I. T. 2401, VII-1 C. B. 126. None of these rulings has ever been modified, amended or revoked.

Each of the Revenue Acts since 1918 has reenacted the credit provisions without change insofar as the issue here is concerned. This Court has said on numerous occasions that Congress must be taken to have been familiar with the administrative interpretation embodied in published Internal Revenue Bureau rulings, and to have approved such interpretation and administrative practice when it reenacted the statutes without change, *Helvering* v. *Bliss,* 293 U. S. 144, 79 L. ed. 246; *McFeely* v. *Commissioner,* 296 U. S. 102, 80 L. ed. 83. It is submitted that the Court below, as well as the Board of Tax Appeals, erred in disregarding these rulings and this uniform practice of more than fifteen years' standing and their sanction by Congress.

Fifteen years of uninterrupted uniform practice approved by Congress should not be ignored. The rationale of this principle is expressed in the opinion of this Court in *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472; 59 L. ed. 673, 681:

> "It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself,—even when the validity of the practice is the subject of investigation."

Conclusion.

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

WILLIAM R. PERKINS,
FORREST HYDE,
WILLIAM R. SPOFFORD,
FREEMAN J. DANIELS,
Counsel for Petitioner.

May 10, 1937.

CPY2917